(1) Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

STEPHANIE FAE NELSON, Petitioner,

vs.

UNITED STATES, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

(1) Whether Petitioner is entitled to a Certificate of Appealability to challenge her conviction for aiding and abetting (18 U.S.C. § 2) the possession of methamphetamine with the intent to distribute (21 U.S.C. § 841) on the grounds she was not extradited from Mexico for 18 U.S.C. § 2, so the district court did not have jurisdiction to try appellant for 18 U.S.C. § 2, to enter judgment for that offense, or to sentence her under the Sentencing Guidelines; and if Petitioner could be sentenced under the Sentencing Guidelines, whether sentencing her for more than 500 grams of a substance containing methamphetamine was prohibited by the Extradition Treaty with Mexico, the Extradition Order issued and reaffirmed by Mexico, and the Rule of Specialty?

(2) Whether Petitioner is entitled to a Certificate of Appealability to challenge the effectiveness of the assistance of her trial and appellate counsel, under the Sixth Amendment, where counsel failed to object to, and raise as issues, violations of the Extradition Treaty with Mexico and the Extradition Order when Petitioner was tried and convicted of aiding and abetting, 18 U.S.C. § 2, but the United States did not seek her extradition for 18 U.S.C. § 2 and Mexico did not extradite her for 18 U.S.C. § 2, and when she was sentenced for a larger quantity of a substance containing methamphetamine than Mexico was informed of?

LIST OF PARTIES

1. United State of America

2. Stephanie Fae Nelson

OPINIONS BELOW

On December 16, 2002, United States Court of Appeals for the Ninth Circuit, Judges Wallace and Leavy, denied a Certificate of Appealability (hereinafter COA) [28 U.S.C. § 2253] from the denial of Stephanie Fae Nelson's (hereinafter Petitioner) 28 U.S.C. § 2255 motion, which appears in Appendix A to this Petition. On May 22, 2002, Senior District Court Judge Earl H. Carroll, refused to issue a certificate of appealability, which appears in Appendix B to this Petition. On March 29, 2002, Senior District Court Judge Earl H. Carroll, in a Memorandum and Order, adopting the Report and Recommendation (R&R) of the Magistrate Judge, denied Petitioner's motion under 28 U.S.C. § 2255, which appears in Appendix C to this petition, and the Judgment was entered against her, which appears in Appendix D to this petition. The R&R of the Magistrate Judge appears in Appendix E to this petition. On June 17, 2003, the United States Court of Appeals for the Ninth Circuit Judges Wallace and Leavy denied Petitioner's motion for rehearing and rehearing en banc, which was treated as a motion for reconsideration of the denial of a certificate of appealability, which appears in Appendix F to this Petition.

BASIS OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit denied Petitioner's motion for reconsideration for a certificate of appealability, which was necessary to proceed with the appeal from the denial of Petitioner's 28 U.S.C. § 2255 motion, on June 17, 2003. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article II, section 2, clause 2; Article VI, clause 2; Sixth Amendment; 18 U.S.C. § 2253; 18 U.S.C. § 2; Extradition Treaty with Mexico, 31 U.S.T. 5059 (T.I.A.S. 6569); all set forth in Appendix G.

STATEMENT OF THE CASE AND FACTS

A superseding indictment charged Petitioner in count 3 with conspiracy to possess with intent to distribute methamphetamine between January 1, 1993 and April 4, 1996; and in count 7 with possession with intent to distribute methamphetamine (21 U.S.C. § 841 (A)(1)), and aiding and abetting (18 U.S.C. § 2), on or about November 3, 1995. On December 9, 1996, the Embassy of the United States filed a Petition for Extradition (hereinafter Petition) with Mexico seeking to extradite Petitioner for "(a) one count of possession with intent to distribute a controlled substance (methamphetamine), in violation of 21 United States Code (U.S.C.) 841 (A) (1) [there was no mention of 18 U.S.C. § 2]; and (b) one count of conspiracy to possess with intent to distribute a controlled substance, in violation of 21 U.S.C. § 846." Assistant United States Attorney (hereinafter AUSA) Scheel in an affidavit attached thereto alleged Petitioner was charged with conspiracy, citing Title 21, U.S.C. § 846, and possession with intent to distribute a controlled substance, citing Title 21, U.S.C. 841 § (a)(1). AUSA Scheel did not mention 18 U.S.C. § 2 in her affidavit. While AUSA Scheel attested she was attaching the relevant statutes, she did not include a copy of 18 U.S.C. § 2, although she did submit the text of numerous other

statutes. The affidavits in support of the Petition alleged possession of approximately one pound (less that 500 grams) of a substance containing methamphetamine, with intent to distribute, on or about November 3, 1995. Mexico acknowledged receipt of the text of the statutes attached to the Petition, but not 18 U.S.C. § 2, in its Extradition Order (hereinafter Order).

On March 14, 1997, Mexico ordered Petitioner's extradition to the United States for "one charge of possession with intent to distribute a controlled substance (methamphetamine) in violation of Section 841 (A)(1) of Title 21 of the Code of the United States (U.S.C.)." There was no reference to the arrest warrant or "count seven." Mexico further concluded "no extradition is granted for the charge of conspiracy to possess with intent to distribute a controlled substance, in violation of § 846 of Title 21 U.S.C.."

Prior to her trial, Petitioner's counsel filed a motion to dismiss count 3 of the indictment, the conspiracy count, arguing prosecution for that count violated the Order. The United States filed its response, pointing out it was seeking permission from the government of Mexico to proceed against Petitioner on the conspiracy count. Thereafter, Mexico informed the Department of State it "has not granted its consent" for appellant "to be tried on charges other that [sic] those which authorized" her "extradition."

At Petitioner's trial, the prosecutor told the jury, in opening statement, Petitioner was being charged with aiding and abetting the possession with intent to distribute methamphetamine. (RT 33) Prior to argument, the jury was instructed, at the prosecution's request, on aiding and abetting (RT 244, 864), without objection by Petitioner's counsel. In opening jury argument, the prosecutor argued the evidence showed Petitioner aided and abetted the

possession of methamphetamine, with the intent to distribute. (RT 474) In closing argument the prosecutor conceded Petitioner did not have actual possession of methamphetamine, and primarily relied on an aiding and abetting theory. (RT 175) Petitioner was found guilty of possession of methamphetamine with intent to distribute and aiding and abetting. (RT 785)

On November 25, 1997 the district court imposed a sentence of 188 months, special parole of four years, and a fine of $17,500. (RT 11/17-11/25, 1997, pp. 62-63) Petitioner filed a timely notice of appeal. On December 16, 1998, the United States Court of Appeals for the Ninth Circuit issued its opinion affirming her conviction (97-10540), finding there "was sufficient evidence to support Nelson's conviction as an aider and abettor."

Petitioner raised the issues of prosecuting her for "aiding and abetting," sentencing her for more that 500 grams of a substance containing methamphetamine, and the ineffective assistance of trial and appellate counsel for failing to raise these issue before the trial and appellate courts, in her 28 U.S.C. § 2255 motion. After the district court denied said motion, Petitioner sought, but was unable to obtain, a COA from the district court or the United States Court of Appeal for the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED, A CERTIFICATE OF APPEALABILITY ISSUED AND THIS CASE REMANDED FOR A BRIEFING SCHEDULE.

A.
Only A Minimal Showing Is Necessary For A Certificate Of Appealability

In *Slack v. McDaniel*, 529 U.S. 473 (200), this Court determined that the lower federal courts had been applying too strict a standard for issuing a COA (*Slack v. McDaniel, supra*, 529 U.S. at p. 480), and pointed out the pre 1996 standard, set forth in *Barefoot v. Estelle*, 463 U.S. 880 (1983), for issuing a certificate of probable cause was the same standard to be applied for issuing a COA and that to obtain a COA the moving party only had to be demonstrate that "reasonable jurists could debate (or for that matter agree that) the petition should have been resolved in a different manner or the issues presented were '"adequate to deserve encouragement to proceed further."'" (*Slack v. McDaniel, supra*, 529 U.S. at p. 484.)

In the recently completed 2002 term, this Court explained this minimal showing to obtain a COA in *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 1040 (2003):

> We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and

the case has received full consideration, that petitioner will not prevail. As we stated in *Slack*,"'where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."

Even a cursory look at the issues presented here, and the case law on these subjects, demonstrates Petitioner meets this minimal standard and this Court should issue a COA and remand the matter for a briefing schedule.

B.

Extradition Related Issues

In her 28 U.S.C. § 2255 motion, Petitioner contended her conviction was obtained in violation of Article II, Section 2, clause 2 of the Constitution, the Supreme Law of the Land under Article VI, clause 2, as it was obtained in violation of the self executing Treaty with Mexico (31 U.S.T. 5059, T.I.A.S. 9656; Apx. G. pp. 3-20). (See *Cook v. United States*, 288 U.S. 102, 119 (1933)) Under established constitutional law, prosecution is authorized only for offenses extradition is granted for; prosecution is prohibited for lesser or related offenses, even if based upon the same facts. (*United States v. Rauscher*, 119 U.S. 407, 441, 432[1/] (1886); *Johnson v.*

[1/] "It may be very true that evidence which satisfied that officer that the prisoner was guilty of the crime of murder would also establish that he had inflicted cruel and unusual punishment on the person for whose murder he was charged; but, as the treaty only justified his delivery on the ground that he was proved to be guilty of murder before the committing magistrate, it does not follow at all that such magistrate would have delivered him on a charge, founded upon precisely the same evidence, of inflicting cruel and unusual

Browne, 205 U.S. 309, 316, 320-321 (1907); see also *United States v. Alvarez-Machain*, 504 U.S. 655, 659-660 (1992)) As the United States did not seek extradition for 18 U.S.C. § 2 in the Petition, and Mexico did not Extradite Petitioner for 18 U.S.C. § 2, these cases, and the applicable legal doctrine, the Doctrine of Specialty,[2/] demonstrate this issue is adequate to deserve encouragement for Petitioner to proceed further, and required the lower courts to issue a COA to Petitioner.

In *Johnson v. Browne, supra*, 205 U.S. at p. 321,[3/] this Court explained that a treaty between sovereignties should be construed with the highest good faith and that ambiguity should not be relied upon to achieve imprisonment of the individual sought. The United States Court of Appeals for the Ninth Circuit has held it would not infer an agreement to extradite for an offense not listed in the extradition documents of the extraditing country.

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punishment, an offence for which the treaty made no provision, and which was of a very unimportant character when compared with that of murder. If the party could be convicted on an indictment for inflicting cruel and unusual punishment where the grand jury would not have found an indictment for murder, the treaty could always be evaded by making a demand on account of the higher offence defined in the treaty, and then only seeking a trial and conviction for the minor offence not found in the treaty."

[2/] The Doctrine of Specialty is incorporated into the Treaty in Article 17. (Apx. G. pp. 16-17)

[3/] "It is urged that the construction contended for by the respondent is exceedingly technical and tends to the escape of criminals on refined subtleties of statutory construction, and should not, therefore, be adopted. While the escape of criminals is, of course, to be very greatly deprecated, it is still most important that a treaty of this nature between sovereignties should be construed in accordance with the highest good faith, and that it should not be sought by doubtful construction of some of its provisions to obtain the extradition of a person for one offense and then punish him for another and different offense."

(*United States v. Khan*, 993 F.2d 1368, 1374 (9th Cir. 1993)) There, the United States sought to extradite the defendant from Pakistan for using a communication facility to facilitate a narcotic transaction, under 21 U.S.C. § 843 and 18 U.S.C. § 2, but the extradition order from Pakistan did not mention either statute, so the defendant's conviction for that count was reversed. (*Ibid.* at p. 1375.) Here, the United States did not seek extradition for 18 U.S.C. § 2 in the Petition and Mexico did not authorize extradition for 18 U.S.C. § 2 in the Order. (See also *United States v. Baramdyka*, 95 F.3d 840, 846 (9th Cir. 1996), where the United States Court of Appeals for the Ninth Circuit concluded that a guilty plea to a count of an indictment that extradition had not been granted for, presented a jurisdictional issue that was not waived by a guilty plea to that count.)

Moreover, in *United States v. Gallo-Chamorro*, 48 F.3d 502 (11th Cir. 1995), the United States sought the defendant's extradition from Columbia for numerous narcotic offenses including violations of 18 U.S.C. § 2. Columbia approved extradition for several offenses but did not authorize prosecution for 18 U.S.C. § 2. Prior to trial the defendant filed a motion to enforce the doctrine of "Specialty," arguing he could not be prosecuted for 18 U.S.C. § 2. The district court precluded the United States from prosecuting the defendant for aiding and abetting offenses (*United States v. Gallo-Chamorro, supra*, 48 F.3d at p. 504.), and the Eleventh Circuit agreed with this ruling. (*Ibid.* at p. 705.)

In adopting the R&R, the district court concluded it could be inferred that Mexico intended to extradite Petitioner for 18 U.S.C. § 2 because 18 U.S.C. § 2 was included in the arrest warrant provided to Mexico and because Mexico did not specifically reject extradition for 18

U.S.C. § 2, even though it did not specifically authorize extradition for 18 U.S.C. § 2. (Apx. E. pp. 5-6) The adopted R&R placed too much emphasis on the arrest warrant. While the arrest warrant is a supporting document required under Article 10, paragraph 3, section (a) of the Treaty (Apx. G. p. 11), there is no provision in the Treaty allowing an arrest warrant to expand the offenses extradition is authorized for. In fact, the Treaty is clear, under Article 10, paragraph 2, section (b) [Apx. G. p. 11], that the text of the legal provisions describing the elements of offenses for which extradition is sought must be provided in the Petition.

Significantly, but not discussed in the adopted R&R, the elements of aiding and abetting, under 18 U.S.C. § 2, differ from the elements for the underlying offense, here possession with intent to distribute. (See *United States v. Gaskins*, 849 F.2d 454, 459-460[4/] (9th Cir. 1988); cf. *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)) Therefore, failing to provide the text of 18 U.S.C. § 2 was in direct violation of unambiguous language in the Treaty if extradition was sought for 18 U.S.C. § 2. When the R&R concluded that including the arrest warrant that merely listed 18 U.S.C. § 2 [without providing its text or elements], was sufficient, it did so contrary to the reasoning in *Johnson v. Browne, supra*, and *United States v. Khan, supra*. Therefore, the explicit terms of the Treaty precluded the United States from prosecuting Petitioner for 18 U.S.C. § 2. (See Article 17, § 1; Apx. G. p. 16)

[4/] "[T]he government's argument that an aider and abettor is a principal does not provide an answer to the issue before us because the argument ignores the different elements the government must prove under the two theories and ignores the different arguments that the defense may make concerning the elements of the theory involved." (Emphasis added.)

Even though Mexico did not list 81 U.S.C. § 2 as something Petitioner was extradited for, the adopted R&R concluded that extradition was authorized for 18 U.S.C. § 2 because Mexico did not specifically exclude extradition for 18 U.S.C. § 2, as it did for 21 U.S.C. § 846. (Apx. E. p. 10) This ignored the fact that in the Petition the United States asked Mexico to extradite Petitioner for 21 U.S.C. § 846, and Mexico specifically refused to do so, because required documentation was not provided by the United States. Obviously, Mexico did not specifically refuse to extradite Petitioner for 18 U.S.C. § 2 because the United States did not seek petitioner's extradition from Mexico for this. There was simply no reason for Mexico to specifically refuse to extradite Petitioner for 18 U.S.C. § 2, when extradition was not sought for this offense. The adopted R&R turns extradition law upside down, requiring Mexico to explicitly refuse extradition for 18 U.S.C. § 2 even though it was not asked to extradite Petitioner for 18 U.S.C. § 2.

The adopted R&R also reasoned that the Treaty was not violated when the text of 18 U.S.C. § 2 was not provided to Mexico, because in criminal prosecutions in the United States 18 U.S.C. § 2 usually applies to any criminal statute and therefore is impliedly included within each federal indictment for a substantive offense. (Apx. G. pp. 7-8) Whether or not this is correct, this is not relevant to the proper interpretation of the Treaty and Order. Under the Treaty, Mexico is not presumed to be familiar with United States law. This is obviously why the text of legal provisions and elements of the offenses are required under its terms. As the elements for 18 U.S.C. § 2 are different from the elements for the substantive offense (see *United States v. Gaskins, supra*, 849 F.2d at p. 460), the text of 18 U.S.C. § 2 was required for extradition for 18 U.S.C. § 2,

under the teachings of *Johnson v. Browne, supra,* and *United States v. Khan, supra,* as previously pointed out.
After Petitioner was returned to the United States by Mexico, she was tried for, and convicted of, 21 U.S.C. § 841 and 18 U.S.C. § 2 (aiding and abetting). When reviewing her conviction, on direct appeal, the United States Court of Appeals for the Ninth Circuit only mentioned sufficient evidence to affirm the conviction for aiding and abetting. (Ninth Circuit No. 97-10540, part IX, section C)[5/] The adopted R&R downplays this conclusion, concluding that while it was apparent the Ninth Circuit determined the evidence was sufficient to sustain Petitioner's conviction as an aider and abettor, it was not apparent the Ninth Circuit did not find the evidence sufficient to support her conviction under a constructive possession theory. (Apx. G. pp. 11-12) The adopted R&R then infers if the Ninth Circuit felt the evidence was insufficient to establish constructive possession it would have said so; no authority is provided to support this speculation. It is beyond dispute, however, that when the Ninth Circuit was directly confronted with the argument the evidence was insufficient to support both constructive possession and aiding and abetting, the Ninth Circuit only concluded that the evidence was sufficient to uphold an aiding and abetting conviction.[6/] The obvious inference, as opposed to speculation, from the Ninth

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[5/] "Based on the evidence of Nelson's participation in the methamphetamine operation and the evidence of her involvement with the methamphetamine that Miller possessed with intent to distribute on November 3, there was sufficient evidence to support Nelson's conviction as an aider and abettor."

[6/] This was the primary theory relied upon by Respondent in jury argument. (RT 474-57, 155)

Circuit's opinion is that the evidence was only sufficient to establish 18 U.S.C. § 2.

When Petitioner was sentenced, her sentence was calculated using much more than the 350 to 500 grams of a substance containing methamphetamine, as represented to Mexico in the affidavits in support of the Petition. However, the Treaty required the United States to provide the factual basis for the offense (Article 10, § 2, subd. (a); Apx. G. pp. 10-11) which obviously included the amount of substance containing methamphetamine alleged to be involved, and the legal provisions describing the punishment for the offense. (Article 10, § 2, subd. (c); Apx. G. p. 11) While the United States provided the text of 21 U.S.C. § 841, it did not provide the text of any Sentencing Guidelines provision, describing the offense level (punishment range) for Petitioner.

According to the Petition submitted to Mexico, the highest Sentencing Guideline offense level for Petitioner was level 30, between 350 and 500 grams of a substance containing methamphetamine. (USSG § 2D1.1) At a criminal history of 4, as found by the district court (11/17-11/25, 1997 p. 62), this established a guideline range of 135-168 months; which when reduced 5 levels, for duress, as found by the district court (Ibid. at p. 36), produced an offense level to 25. With a criminal history of 4, the sentencing range was 84-105 months, well below Petitioner's actual sentence of 188 months, and an amount of time that Petitioner, with 15% credit, has already served.

This Court has acknowledged that the advent of the Sentencing Guidelines revolutionized the manner in which district courts now impose sentence. (*Burns v. United States*, 501 U.S. 129, 132 (1991)) The Sentencing Guidelines went into effect in 1987, after the current treaty with Mexico

was ratified in 1980. The change in sentencing law enacted after the effective date of the Extradition Treaty with Mexico, could not be used to increase Petitioner's punishment from what it would have been at the time the Treaty went into effect, absent a showing, not made below, that this was an intended purpose of the Sentencing Guidelines. (See *Cook v. United States, supra*, 288 U.S. at pp. 120.).[7/] Therefore, it is a debatable question whether Petitioner should have been sentenced under the Sentencing Guidelines. If Petitioner could be sentenced under the Sentencing Guidelines, the text of the Sentencing Guidelines had to be supplied under the Treaty. (Article 10, § 2, subd. (c); Apx. G. p. 11) Petitioner is unaware of any case from the United States Court of Appeals for the Ninth Circuit deciding this question.[8/]

The adopted R&R (Apx. E. p. 13) relied on distinguishable out of Circuit authority, *United States v. Garcia*, 208 F.3d 1258 (11th Cir. 200)), to conclude that the text of the Sentencing Guidelines were not required. There, Canada extradited the defendant for conspiracy to distribute marijuana [in Florida], possession of marijuana with the intent to distribute, and using a firearm in connection with the conspiracy. After pleading guilty to conspiracy to distribute marijuana and carrying a firearm in connection with that conspiracy, the defendant was

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7/ "A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."

8/ *United States v. Lazarevich*, 147 F.3d 1061 (9th Cir. 1998), dealt with a sentence under the Sentencing Guidelines, but did not discuss whether the Treaty with the Netherlands was executed before or after the sentencing guidelines went into effect, or whether relevant provisions of the sentencing guidelines were provide to the Netherlands in the extradition treaty.

sentenced to 360 months incarceration with the court departing upward for uncharged shipments of marijuana to Louisiana and for the murder of one of defendant's marijuana distributors. However, Canada was aware of these other offenses and had agreed to allowing the other offenses to be used in determining the defendant's sentence. (*United States v. Garcia, supra,* 208 F.3d at p. 1261.) Here, Mexico was not aware of any substance containing methamphetamine in excess of 500 grams involving Petitioner and did not specifically agree to a sentence based upon more than 500 grams of a substance containing methamphetamine for Petitioner.

The above authorities, considered separately or together, required a COA to be issued to Petitioner under the recent rulings of this Court in *Slack v. McDaniel, supra,* 529 U.S. at p. 484 and *Miller-El v. Cockrell, supra,* 123 S.Ct. at pp. 1039-1040, because, at a bare minimum petitioner's arguments are certainly debatable by reasonable jurists.

C.

Ineffective Assistance Of Counsel

Under the Sixth Amendment, Petitioner was entitled to the effective assistance of counsel at trial and on appeal. (See *Strickland v. Washington,* 466 U.S. 668 (1984) and *Anders v. California,* 386 U.S. 738 (1967)) For counsel to be effective, counsel had to investigate all defenses, which included defenses arising under the Treaty. Here, counsel did not object to Petitioner's prosecution for aiding and abetting, although not authorized by the Order; did not object to jury instructions regarding aiding and abetting; did not object to the prosecutor's argument, urging the jury to convict Petitioner for aiding and abetting; and did not

challenge the jury's aiding and abetting guilty verdict under the Treaty. At sentencing, counsel did not argue Petitioner could not be sentenced under the Sentencing Guidelines, nor did he argue if she could be sentenced under the Sentencing Guidelines, she could only be sentenced for between 350 and 500 grams of a substance containing methamphetamine, as this was what Petitioner was extradited for. On appeal, counsel also failed to raise these issues.

The United states Court of Appeals for the Ninth Circuit has determined that counsel is ineffective for not objecting to prosecution for offenses not authorized by an extradition order, as there is no jurisdiction to try offenses not authorized by the extradition order. (*United States v. Baramdyka*, 95 F.3d 840, p. 846[9/] (9th Cir. 1996)) That case, alone, should require a COA to be issued for Petitioner, as previous counsel did not raise these issues regarding 18 U.S.C. § 2.

To establish prejudice from counsel's failure, it must be shown that "'there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." "A reasonable probability is a probability sufficient to undermine confidence in the outcome." It is less than a preponderance; "the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have

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9/ "[B]oth the government and the trial court were under the erroneous impression that Baramdyka was extradited on count 8 when all parties now concede that he was not. . . . Trial counsel's failure to determine this fact from the record of extradition constitutes deficient performance."

determined the outcome." (*Strickland v. Washington, supra,* 466 U.S. at pp. 688, 694.)

Under these facts, prejudice from counsel's failures[10/] was established by the United States Court of Appeals for the Ninth Circuit's earlier conclusion, on direct appeal, that the evidence at Petitioner's trial supported a verdict for aiding and abetting. (See footnote 5, *supra.*) It is at least debatable that this determination by the United States Court of Appeals for the Ninth supports Petitioner's argument she was prejudiced by counsel's failure. Petitioner was also prejudiced by her 188 month sentence, 83 months more than the maximum under her proper Sentencing Guideline range. As there is case authority from this Court and the United States Court of Appeals for the Ninth Circuit supporting Petitioner's arguments regarding ineffective counsel and no definitive authority from this Court compelling the conclusion Petitioner is incorrect in her arguments, a COA was required to be issued regarding these questions.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Ninth Circuit, denying Petitioner a COA from the denial of her motion under 28 U.S.C. § 2255, when she has clearly presented debatable constitutional issues. It is submitted that under these facts Petitioner is entitled to a COA to pursue an appeal as her issues are

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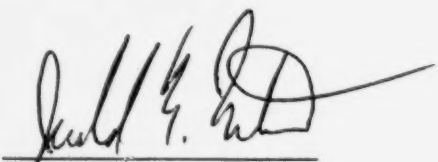
[10/] *Khan, supra; Baramdyka, supra;* and *Gallo-Chamorro, supra,* were all decided before appellant's trial.

clearly more than "debatable" as they are supported by clear authority from this Court.

DATED: September 11, 2003

Respectfully submitted,



Jerald W. Newton
CA. SB No.51243
Attorney for Petitioner
Stephanie Fae Nelson

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
STEPHANIE FAE NELSON,
Defendant-Appellant

No. 02-16074
D. C. No. CV-00-00652-EHC
Arizona, Phoenix
Entered on December 16, 2002

ORDER

Before: WALLACE and LEAVY, Circuit Judges,

The request for a certificate of appealability is DENIED. *See* 28 U.S.C. § 2253 (c)(2).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,
Plaintiff-Respondent,
vs.
STEPHANIE FAE NELSON
Defendant-Movant.

CRIMINAL ACTION NO. 96-160-PHX-EHC
CIVIL ACTION NO. 00-652-PHX-EHC (MS)

CERTIFICATE OF APPEALABILITY
and
ORDER TO PROCEED ON APPEAL
IN FORMA PAUPERIS

Entered on May 22, 2002

I, Earl H. Carroll , __, Judge of the United States District Court for the District of Arizona, certify that I have examined the Petition of Stephanie Fae Nelson for issuance of a Certificate of Appealability, together with the application for a Writ of Habeas Corpus filed in this Court, and FIND:

/_/ that the probable cause exists for the appeal taken in the above-named cause through the United States Court of Appeals for the Ninth Circuit from the Order of this Court denying petitioner's application for Writ of Habeas Corpus, and GRANTS that petitioner be allowed to proceed in forma pauperis for appeal purposes only. The appellant has made a substantial showing of the denial of a

constitutional right with respect to the following issues; _____

/x/ that the probable cause does not exist for the appeal. The applicant has not made a substantial showing of the denial of a constitutional right.

DATED this 27th day of March, 2002.

/s/ Earl H. Carroll

UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,
Plaintiff-Respondent,
vs.
STEPHANIE FAE NELSON
Defendant-Movant.

CRIMINAL ACTION NO. 96-160-PHX-EHC
CIVIL ACTION NO. 00-652-PHX-EHC (MS)

Entered on March 29, 2002

ORDER

Stephanie Fae Nelson, Petitioner, filed a motion to Vacate, Set Aside of Correct Sentence pursuant to 28 U.S.C. § 2255. (Dkt. 436). Respondent filed a Response to Petitioner's Motion. (Dkt. 473). Petitioner filed a Reply. (Dkt. 448).

Petitioner filed a Motion to Amend the Habeas Petition. (Dkt. 473).

Magistrate Judge Morton Sitver filed a Report and Recommendation addressing the Habeas motion and motion to Amend. (Dkt. 484). Petitioner filed Objections to the Report of the Magistrate judge. (Dkt. 490).

STANDARD OF REVIEW

A district court judge reviews de novo the Report and recommendation of a Magistrate Judge. See 28 U.S.C. § 636(b)(l)(C) and Rule 1.15(b) Rules of Practice of the United

States District Court for the District of Arizona.

This Court having reviewed the record de novo, including Petitioner's Objections, adopts in full the Report and Recommendation of the Magistrate Judge (Dkt. 484) and incorporates the same as a part of this Order. See also: U.S. v. Sanchez-Cervantes, 9th Cir. 98-35897, Opinion filed March 1, 2002.

Accordingly,

IT IS HEREBY ORDERED adopting the Report and Recommendation of the Magistrate Judge. (Dkt. 484).

IT IS FURTHER ORDERED denying Petitioner's Motion filed pursuant to 28 U.S.C. § 2255. (Dkt. 436) and Motion to Amend. (Dkt 473)

DATED this 27th day of March, 2002.

/S/ Earl H. Carroll
Earl H. Carroll
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,
Plaintiff-Respondent,
vs.
STEPHANIE FAE NELSON
Defendant-Movant.

CRIMINAL ACTION NO. 96-160-PHX-EHC
CIVIL ACTION NO. 00-652-PHX-EHC (MS)

Entered on March 29, 2002

JUDGMENT

This action came on for consideration before the Court, the Honorable Earl H. Carroll, United States Judge presiding, and the issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the defendant's motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. 2255 is denied.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant take noting and the action be, and the same hereby is, dismissed.

Dated at Phoenix, Arizona, this 29th day of March 2002.

RICHARD H. WEARE, clerk/DCE

By /S/ B Walker
B. walker, Deputy Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,
Plaintiff-Respondent,
vs.
STEPHANIE FAE NELSON
Defendant-Movant.

CRIMINAL ACTION NO. 96-160-PHX-EHC
CIVIL ACTION NO. 00-652-PHX-EHC (MS)

Entered on February 15, 2002

REPORT AND RECOMMENDATION

TO THE HONORABLE EARL H. CARROLL, U.S. SENIOR DISTRICT JUDGE

On April 11, 2000, Movant by and through her counsel, and while confined at the Federal Corrections Institute in Dublin, California, filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. [Doc. #436].[1] Movant alleged the following grounds for habeas relief:

1) That the district court lacked jurisdiction when

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[1] Although Movant's § 2255 Motion has been given a civil number, CIV 00-652-PHX-EHC (MS), all documents related to this motion are filed in the Court's criminal file, CR 96-160-El 1C. Therefore, whenever the Court refers to a document contained in the file for this case, it will refer to the docket number of documents contained in the criminal file.

it tried her on the charge of aiding and abetting under 18 U.S.C. § 2, because Mexico extradited her to face a charge only of possession with intent to distribute methamphetamine under 18 U.S.C. § 841. Moreover, Movant contends her conviction was affirmed by the Ninth Circuit only on the allegedly improper charge of aiding and abetting.

2) Her sentence violated the Extradition Treaty between the United States and Mexico, and the Extradition Agreement when her sentence was determined based on possession of more than 500 gram of methamphetamine.

3) Ineffective assistance of counsel at trial and sentencing because counsel failed to challenge either her prosecution of an aiding and abetting charge or her sentence for possession of more than 500 grams of methamphetamine.

4) Ineffective assistance of counsel on appeal because counsel failed to challenge either her conviction of an aiding and abetting charge or her sentence for possession of more than 500 grams of methamphetamine.

Respondent filed its response opposing the Motion on June 15, 2000. [Doc. # 444].
Movant filed a reply (traverse) to that response on July 13, 2000. [Doc. # 448].

On June 25,2001, Movant filed a Motion to Amend 28 U.S.C. 2255 Motion, With Leave of Court; Alternatively to Treat this Filing as a New 28 U.S.C. 2255 Motion. [Doc. #

473]. Movant based her additional grounds for habeas corpus relief on the United States Supreme Court opinion in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000). The additional grounds Movant alleged were :

> 1) Her indictment violated her Fifth Amendment due process rights by failing to require a jury finding of drug quantity;
>
> 2) This Court erred in finding Movant's relevant conduct offense level was 38, involving over 15 kilograms of methamphetamine, when the evidence submitted to Mexico for extradition and the most credible trial evidence indicated Movant's conduct involved less than one kilogram of methamphetamine; and
>
> 3) Movant received ineffective assistance of counsel because her counsel failed to request jury instructions requiring a finding of drug quantity, failed to object to this Court's reliance on a preponderance of the evidence standard in determining drug quantity for sentencing purposes, and failed to object to a sentence exceeding the maximum allowed by the applicable statute.

Respondent filed its response opposing this Motion on July 5, 2001. [Doc. # 474].

Upon review of Movant's motions, the responses, reply, and the record, this Court reports and recommends as follows:

I. BACKGROUND

As part of an investigation conducted by the Bureau of Alcohol, Tobacco and Firearms ("ATF") of a methamphetamine trafficking operation in the Phoenix, Arizona area, a search

warrant was executed at Movant's residence on November 30, 1995. [Doc. # 444 at 1-2]. At some point after the search, Movant and her co-defendant fled to Mexico. [Id. at 3]. Evidence obtained under the warrant and investigation led to the filing of a superseding indictment against Movant in which she was charged under Count 3 with conspiracy to possess with intent to distribute methamphetamine between January 1, 1993 and April 4, 1996, in violation of 21 U.S.C. § 841(a)(1), and under Count 7 with possession with intent to distribute methamphetamine, and aiding and abetting, on or about November 3,1995, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. [Doc. # 49]. A bench warrant was issued for Movant's arrest. [Id.].

Movant was arrested in Mexico in October 1996 pursuant to a provisional arrest warrant requested by the United States, and detained pending an extradition hearing. [Doc. # 444 at 3]. Mexico authorized Movant's extradition on March 14, 1997 in an Extradition Determination [Doc. # 437, Exh. A], but limited extradition for Movant to prosecution for "one charge for possession with intent to distribute a controlled substance (methamphetamine) in violation of Section 841 (A)(1) of Title 21 of the Code of the United States (USC)." [Id. at 16]. The Extradition Determination specifically provided that extradition was not granted for the charge of conspiracy to possess with intent to distribute a controlled substance in violation of 21 U.S.C. § 846. [Id.].

Thereafter, Respondent requested permission from Mexico to proceed against Movant on the conspiracy count in the indictment. [Doc. # 437 at 2]. Mexico refused the request in correspondence dated June 30,1997, reiterating that Movant had been extradited to face the charge of possession with intent to distribute under 21 U.S.C. § 841 (a)(1), and had been exempted from prosecution on the criminal conspiracy charge. [Doc. #

437, Exh. B]. Mexico emphasized the fact that Movant's arrest warrant failed to include charges for conspiracy. [Id.].

After a jury trial, on August 8, 1997 Movant was found guilty on Count 7, Possession With Intent to Distribute Methamphetamine or Aid and Abet. [Docs. # 295, 296]. On November 25,1997, Movant was sentenced to a term of imprisonment of 188 months, a fine of $ 17,500, a special assessment of $ 50, and 5 years of supervised release after incarceration. [Doc. # 358].

II. Movant's Conviction for Aiding and Abetting

Movant contends her prosecution for the offense of aiding and abetting violated the Rule of Specialty because the Extradition Determination granted her extradition only for the substantive charge of possession with intent to distribute a controlled substance (methamphetamine). [Doc. # 437 at 4]. Movant notes the jury was instructed on aiding and abetting, and that she was convicted on Count 7, which included a charge of aiding and abetting. [Id. at 5]. Moreover, Movant argues that in the Ninth Circuit's decision affirming her conviction, it found the evidence sufficient to support her conviction only as an aider and abettor. [Id. at 6].

Respondent counters that Movant was extradited for Count 7 of the indictment, which included the substantive charge of possession with the intent to distribute methamphetamine as well as the additional charge of aiding and abetting, which is a theory of culpability. [Doc. # 444 at 5-6]. Respondent concludes no violation of the Rule of Specialty occurred because Movant was extradited for a violation of 21 U.S.C. § 841 (a)(1) and was convicted for the same violation. [Id.].

The Rule of Specialty[2] is incorporated in the Extradition Treaty between the United States and Mexico as follows: "A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which extradition has been granted nor be extradited by that Party to a third State ...." Extradition Treaty, May 4,1978, U.S.-Mex., 31 U.S.T. 5059, 5071. [Doc. # 175, Exh. A]. At issue here is whether Mexico extradited Movant for the charge of aiding and abetting. Movant's arrest warrant cited the superceding indictment charging Movant with "Possession With intent to distribute Methamphetamine; Aid and Abet" in violation of both 18 U.S.C. § 2 and 21 U.S.C. § 841(a)(1), but did not include mention of a charge for conspiracy. [Doc. # 49]. As noted, Count 3 of the superceding indictment alleged a charge of conspiracy against Movant. It appears that inclusion of the charges in the arrest warrant was a determinative factor to Mexico's decision regarding allowable charges for extradition. In both its March 14, 1997 Extradition Determination and its June 30, 1997 correspondence rejecting the United States' request to try Movant for the charge of conspiracy, Mexico reasoned that extradition should not be granted as to the charge of conspiracy. The English-translated Extradition Determination states:

> Inasmuch as the warrants for arrest issued against the requested parties do not mention specifically the crime of conspiracy to possess with intent to distribute a controlled substance, against each one of them, this Department deems that extradition should not be granted as to what

---

[2] This term is spelled either "Speciality" or "Specialty" in the case law. For purposes of consistency, the latter spelling is used in this Report and Recommendation.

pertains specifically to those crimes ....

[Doc. 347, Exh. A at 15]. Because a charge of aiding and abetting was included in the arrest warrant, it reasonably may be concluded that Mexico knew of the United States' intention to prosecute Movant under both 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Clearly, Mexico did not exclude from the Extradition Determination authority to prosecute Movant for a charge of aiding and abetting with regard to possession with the intent to distribute a controlled substance (methamphetamine).

In her Reply (Traverse), Movant contends that the Extradition Determination expressly authorized her extradition for prosecution for the charge under 21 U.S.C. § 841(a)(1), without any mention of the aiding and abetting charge under 18 U.S.C. § 2. [Doc. # 448 at 3]. Movant further contends that Mexico could not extradite her on an aiding and abetting charge because the United States did not comply with Article 10, paragraph 2, section (b) of the Extradition Treaty when it failed to provide the text of 18 U.S.C. § 2 with its request for extradition. Article 10, paragraph 2, section (b) of the Extradition Treaty requires that a request for extradition contain the description of the offense for which extradition is requested and will be accompanied by the text of the legal provisions describing the essential elements of the offense.

Respondent submitted with its extradition request pertinent sections of Title 21 U.S.C. §§ 812, 841, 846, 848 and 1308.12 and of Title 18 U.S.C. § 3282, but omitted the text of 18 U.S.C. §2. [Doc. #437, Exh. A at 2].

The undersigned Magistrate does not find Respondent violated the Extradition Treaty by not submitting the text of 18 U.S.C. § 2 with its extradition request. Title 18 U.S.C. § 2 ordinarily applies to any criminal statute, and is implied within each federal indictment for a

substantive offense. United States v. Angwin. 271 F.3d 786, 802 (9th Cir. 2001); United States v. Armstrong. 909 F.2d 1238, 1241 (9th Cir. 1990). Accordingly, the United States need not charge a separate count for aiding and abetting, because "[e]very indictment for a federal offense charges the defendant as a principal and as an aider and abettor." United States v. Lopez-Flores. 63 F.3d 1468, 1477 (9th Cir. 1995) (quoting United States v. Canon. 993 F.2d 1439, 1442 (9th Cir. 1993)). In Armstrong, the Ninth Circuit instructed that

> Section 2 does not define a substantive offense, but rather "describes the kinds of individuals who can be held responsible for a crime; it defines the degree of criminal responsibility which will be attributed to a particular individual. The nature of the crime itself must be determined by reference to some other statute."
>
> 909 F.2d at 1243 (citations omitted).

Movant's reliance on the Ninth Circuit opinions in United States v. Khan. 993 F.2d 1368 (9th Cir. 1993), United States v. Gallo-Chamorro, 48 F.3d 502 (11th Cir. 1995), and United States v. Baramdyka, 95 F.3d 840 (9th Cir. 1996) is misplaced. In Khan, the defendant was extradited to the United States from Pakistan. The indictment charged the defendant in Count II with conspiring to import heroin in violation of 21 U.S.C. § 963, and in Count VIII with using a telephone to facilitate the conspiracy in violation of 21 U.S.C. § 843(b) and 18 U.S.C. § 2. Khan, 993 F.3d at 1370. He was convicted on both counts. Id. at 1371. Defendant challenged his conviction on Count VIII, arguing that because Pakistan's extradition documents made no specific mention of the allegations of Count VIII, or to 21 U.S.C. § 843 or 18 U.S.C. § 2, the count should be dismissed. Id.. at 1373. On appeal, the Ninth Circuit determined that

because the extradition materials did not make specific reference to the statutes underlying Count VIII, Pakistan could not be said to have unambiguously agreed to extradite defendant on that count, and concluded the Rule of Specialty had not been satisfied. Id. at 1373-75. Accordingly, the court ordered defendant's conviction and sentence on Count VIII reversed and dismissed. Id. at 1375. In contrast, here Mexico expressly provided for extradition of Movant on the substantive charge of possession with intent to distribute a controlled substance in violation of 21 U.S.C. § 841(a)(1). As noted, a violation of 18 U.S.C. § 2 was implied in the allegations against Movant under 21 U.S.C. § 841(a)(1).

In Gallo-Chamorro, the defendant was extradited by Colombia to the United States. The United States requested extradition on several narcotics trafficking charges, including violations under 18 U.S.C. § 2. 48 F.3d at 503. Colombia permitted extradition for prosecution on a cocaine importation count under 21 U.S.C. § 952(a) and 960(a)(1), a count of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846, and three counts of distribution of cocaine in violation of 21 U.S.C. § 841(a)(1). Id. Colombia denied extradition on the remaining counts, and expressly stated that "the violation of Title 18, Section 2, of the United States Code does not has [sic] its equivalent in Colombia, and therefore it does not authorize, either, the extradition for this concept."Id. When defendant opposed prosecution under 18 U.S.C. § 2, the United States argued that the Rule of Specialty does not apply to 18 U.S.C. § 2, a statute that does not create a substantive offense. Id. at 504. The district court concluded that consistent with the Rule of Specialty defendant could not be prosecuted under 18 U.S.C. § 2 and omitted all reference to that statute from all counts in the redacted indictment submitted to the jury, and also did not include the standard jury instruction for aiding and abetting.

Id. The Ninth Circuit did not review the district court's conclusion regarding the Rule of Specialty and 18 U.S.C. § 2, and only remarked that it "agreed the extradition papers prohibited the use of 18 U.S.C. § 2 in trying the Defendant. . . ." Id. at 507.

Under the facts here, unlike Colombia in Gallo-Chamorro, Mexico did not prohibit prosecution of Movant under 18 U.S.C. § 2. It permitted prosecution of Movant under the count of possession with intent to distribute a controlled substance (methamphetamine) under 21 U.S.C. § 841(a)(1), which implies the charge of aiding and abetting. The Extradition Determination, however, did specifically prohibit prosecution for conspiracy. [Doc. # 437, Exh. A at 15]. Mexico's attention to the arrest warrant, which listed both 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 and described the charge as "Possession With intent to distribute Methamphetamine; Aid and Abet," but which omitted any reference or mention of conspiracy leads the undersigned Magistrate Judge to conclude that Mexico understood and accepted that Movant could be prosecuted for the substantive offense under 21 U.S.C. § 841(a)(1), applying liability as an aider and abettor, and did not preclude prosecution under that theory.

In Baramdyka, the petitioner had been charged in Counts 1, 2, 3 and 8 of an indictment, but pled guilty to Counts 1 and 8. 95 F.3d at 842,845. In his petition for writ of habeas corpus under 28 U.S.C. § 2255, the petitioner argued ineffective assistance of counsel because his attorney had not informed him that Chile's extradition order extraditing him to the United States permitted prosecution under Counts 1 and 2 only, both conspiracy charges. Id. at 845-46. The Ninth Circuit concluded that the doctrine of specialty prohibited prosecution of petitioner on Count 8 (travel in interstate commerce with the

intent to carry on an unlawful activity in violation of 18 U.S.C. § 1952 (a)(3)), and that his counsel's failure to glean from the extradition record that petitioner had not been extradited on Count 8 constituted "deficient performance." Id. at 846. Nevertheless, the court found that petitioner had failed to establish prejudice from his counsel's ineffectiveness. Id.

Unlike the case at issue here, in Baramdyka the petitioner's indictment contained no count charging violation of 18 U.S.C. § 2. And unlike Count 8 in Baramdyka, in this case Movant was expressly extradited for the substantive offense for which she was tried and found guilty (21 U.S.C. § 841(a)(1)). Thus, Baramdyka does not authorize the result Movant seeks.

Movant was extradited to be tried under 21 U.S.C. § 841 (a)(1) and was convicted on that charge. Due to the Mexican government's emphasis on charges listed on the arrest warrant in deciding to expressly exclude prosecution of Movant for conspiracy charges, and the fact that the aiding and abetting statute was listed on the arrest warrant and was not so excluded, the undersigned Magistrate Judge concludes that Mexico had no objection to the application of aiding and abetting liability against Movant.

III. The Ninth Circuit's decision on Movant's direct appeal of her conviction

Movant suggests that in deciding her direct appeal of her conviction, the Ninth Circuit held the evidence was sufficient only to support her conviction as an aider and abettor, and not the underlying crime. [Doc. #437 at 6]. Although it seems apparent the Ninth Circuit concluded the evidence supported her conviction as an aider and abettor, it likewise is not apparent the court found the evidence did not support her conviction for constructively possessing with intent to distribute methamphetamine. See United States v. Nelson, No. CR-96-00160-3-EHC, 1998 WL 895360 at *7 (9th Cir. (Ariz.) Dec. 17,1998)

(unpublished opinion). If the Ninth Circuit had concluded the evidence regarding constructive possession was insufficient to support Movant's conviction, it would have so stated.

IV. Extradition Treaty terms regarding sentencing on drug quantity

Movant argues that the Extradition Determination prohibited her sentencing on a drug quantity greater than that alleged in the documents provided in the United States' extradition request. [Doc. # 437 at 12-15]. Because the affidavits accompanying the extradition request alleged a drug quantity of less than 500 grams of a substance is containing methamphetamine, Movant argues the Extradition Determination required that she be sentenced according to that quantity even though significantly greater drug quantities were found at trial and at sentencing [Id.] Additionally, Movant contends the United States failed to comply with Article 10 (2)(c) of the Extradition Treaty by not providing the text of the Sentencing Guidelines describing Movant's potential punishment range. [Id. at 13].

Movant's argument lacks merit. Mexico was advised by the United States, through the affidavit of Assistant U.S. Attorney Ann Scheel, that the maximum penalty for violation of 21 U.S.C. § 841(a)(1) is life imprisonment, with a minimum term of imprisonment of ten years, a fine not exceeding $4,000,000, and a term of supervised release of at least five years. [Doc. # 444, Exh. 2 at 9]. Accordingly, Mexico had been provided, if not with the exact text of the Sentencing Guidelines, with language describing the maximum penalty Movant could face for conviction of 21 U.S.C. § 841.

Moreover, the Rule of Specialty does not prevent a court from considering relevant conduct in sentencing an extradited defendant, even if the relevant conduct occurred

outside the charged offense. In United States v. Garcia, the Eleventh Circuit concluded:

> [U]nder our law, the consideration of other conduct in the sentencing process is legally and conceptually a part of the punishment for the inducted crimes and within the limits set for those crimes.
>
> The doctrine of speciality, as interpreted in our law, does not call for the extradition crime to be handled in a vacuum, in any of its phases. Thus, for example, an indictment in existence at the time of extradition can be lawfully superseded after extradition by an indictment charging larger quantities of drugs.

208 F.3d 1258, 1261 (11th Cir. 2000).

Accordingly, because Mexico had been informed of the maximum sentence for the offense on which Movant was convicted, and because the Rule of Specialty did not prevent sentencing of Movant based on a quantity of methamphetamine greater than that alleged in her extradition request, Movant's sentence did not violate the Extradition Treaty.

V. Ineffective assistance of counsel at trial and on appeal

Movant alleges her counsel's performance, both at trial and on appeal, was legally deficient. [Doc. # 437 at 16-18]. Movant claims her trial counsel provided ineffective assistance for failure to: (1) move to dismiss the aiding and abetting allegation from Count 7; (2) object to jury instructions on aiding and abetting; (3) argue the Extradition Treaty restricted her sentence; (4) inform Movant she had not been extradited for the aiding and abetting allegations. [Doc. # 437 at 16].

Movant further argues she received

ineffective assistance of counsel on appeal when her attorney failed to challenge her conviction for aiding and abetting on the basis that it violated the Extradition Treaty, Extradition Determination, and specialty doctrine. [Id. at 17]. Movant believes she was prejudiced both at trial and on appeal because the Ninth Circuit found the evidence at her trial sufficient to support only her aiding and abetting charge, and that she would therefore not have been convicted if not tried for aiding and abetting. [Id.]

To succeed on her claim, Movant must establish that considering all of the circumstances, 1) counsel's representation fell below an objective standard of reasonableness; and 2) Movant was prejudiced thereby. Strickland v. Washington. 466 U.S. 668, 687 (1984). To satisfy the first element, Movant must identify specific acts or omissions which fail to meet the standard of reasonable professional judgment. Id. at 688. Secondly, Movant must prove prejudice by showing that, but for defense counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 693. This two-part standard is applicable to "ineffective-assistance claims arising out of the plea process." Hill v. Lockhart, 474 U.S. 52, 57 (1985).

There is a strong presumption that counsel's conduct falls within the wide range of reasonable assistance, and that counsel has made all significant decisions in the exercise of reasonable professional judgment. See Strickland, 466 U.S. at 689-90; United States v. Hamilton, 792 F.2d 837, 839 (9th Cir. 1986), disapproved on other grounds, United States v. Kim, 105 F.3d 1579 (9th Cir. 1997).

Reasonableness of counsel's conduct is judged from the facts of the particular case and from counsel's perspective at the time of the alleged error in light of all the circumstances. See Strickland, 466 U.S. at 689.

In making a claim of ineffective assistance of counsel, Movant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. at 690. The court must then determine whether the identified acts or omissions were outside the wide range of professionally competent assistance given the surrounding circumstances. See id. The court need not examine whether counsel's performance was deficient before considering whether Movant suffered prejudice. See id. at 697. In order to show prejudice in the plea process, Movant must show "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59; Baramdyka, 95 F.3d at 844.

Movant's arguments lack merit for the reasons discussed above. That is, Movant has failed to demonstrate that the Extradition Treaty, Extradition Determination, or Rule of Specialty precluded prosecution of the allegation of aiding and abetting under Count 7, or restricted her sentence to the drug quantity alleged in the United States' affidavits attached to its extradition request. Accordingly, her representation could not have been ineffective for failure to raise issues on these grounds.

VI. Movant's Motion to Amend 28 U.S.C. 2255 Motion, With Leave of Court; Alternatively to Treat this Filing as a New 28 U.S.C. 2255 Motion

Movant asks this Court to allow her to either amend her 28 U.S.C. § 2255 motion, or to treat her filing as a new motion under 28 U.S.C. § 2255, to add three additional grounds based on the United States Supreme Court's decision in Apprendi. Because the undersigned Magistrate concludes that the Supreme Court has not made Apprendi applicable retroactively to cases on collateral review, and because Apprendi does not otherwise apply to Movant's sentence, it is recommended that Movant's motion to amend be denied as futile. Moreover, Movant's alternative motion to treat her filing as a new motion under 28 U.S.C. § 2255 should be denied because Movant has not obtained leave of the court of appeals to file a second or successive habeas application pursuant to 28 U.S.C. § 2244 (b)(3).

Denial of a motion to amend a habeas corpus motion is governed by Rule 15 of the Federal Rules of Civil Procedure. See 28 U.S.C. § 2242 ¶ 3 (application for a writ of habeas corpus "may be amended or supplemented as provided in the rules of procedure applicable to civil actions."), Rule 15(a) permits a party to amend her complaint by leave of the court at any time, which leave "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Denial of a motion for leave to amend pursuant to Rule 15(a) is subject to review for abuse of discretion. Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995). To determine whether such a denial was an abuse of discretion, a reviewing court considers bad faith by the moving party, undue delay in filing, undue prejudice to the opposing party,

whether the party has previously amended her pleadings, and futility of the amendment. Id.; Coe v. Bell, 161 F.3d 320, 341 (6th Cir. 1998).

In Apprendi, the Supreme Court held for the first time that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. This established a new rule of constitutional law. See Jones v. Smith, 231 F.3d 1227, 1236 (9th Cir. 2000). However, neither the Supreme Court nor the Ninth Circuit has decided whether Apprendi applies retroactively in post-conviction proceedings. See Dillard v. Roe, 244 F.3d 758, 773 n.19 (9th Cir. 2001),petition for cert. filed, (U.S. July 9, 2QQ1) (No. 01-5140), comparing Jones, 231 F.3d at 1238 (rejecting retroactive application of Apprendi to address discrepancies between an information and jury instructions where the instructions included, and the jury found, the factor omitted from the information) with Hoffman v. Arave, 236 F.3d 523, 543-48 (9th Cir. 2000) (Pregerson, J., concurring) (urging retroactive application of Apprendi to petitioner's constitutional challenge to state statute requiring trial judge, rather than the jury, to "determine facts that increase the potential penalty from life imprisonment to death").

In United States v. Sanders, 247 F.3d 139 (4th Cir. 2001), the Fourth Circuit confronted the issue of whether Apprendi applies retroactively to 28 U.S.C. § 2255 cases where the trial judge found the defendant possessed a specific amount of methamphetamine by a preponderance of the evidence, rather than submitting this issue to a jury for their determination beyond a reasonable doubt. The Sanders Court applied Teague v. Lane's requirement that for a "new rule" to merit retroactive application on collateral review, it

must diminish "the likelihood of an accurate conviction" and "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." The Fourth Circuit found the Apprendi rule did not rise to this level. Sanders, 247 F.3d at 148. In reaching this conclusion, the court noted:

> [W]e do not read Apprendi to hold that the country's criminal justice system malfunctioned so fundamentally prior to the year 2000, as to merit the retroactive application of the Court's new procedural rule. Apprendi itself recognized that judges in this country, in accordance with the Constitution, had long exercised discretion in imposing sentences within the particular range determined by the legislature.

Id. at 150. The court further observed:

> [T]he majority of the federal circuit courts have subjected Apprendi claims to harmless and plain error review. As these court have recognized, it is possible for a criminal defendant to have a fair and accurate trial without the new procedural protection offered by Apprendi.

Id. [citations omitted].

In the recent Supreme Court decision Tyler v. Cain, 121 S. Ct. 2478 (2001), the Supreme Court clarified when a new rule is made retroactive to cases on collateral review. In Tyler, the petitioner relied on Cage v. Louisiana. 498 U.S. 39 (1990) (per curiam), which introduced a new rule of constitutional law: jury instructions are unconstitutional if there is a reasonable likelihood that the jury understood the instruction to allow conviction without proof beyond a reasonable doubt. 121 S. Ct. at 2480, 2482. The petitioner

argued that the new Cage rule served as an exception, under 28 U.S.C. § 2244(b)(2)(A), to successive habeas petitions on the basis that it was a new constitutional rule "made retroactive to cases on collateral review." Id. The Court rejected this position, stating:

> [T]he Supreme Court is the only entity that can "ma[k]e" a new rule retroactive. The new rule becomes retroactive, not by the decisions of the lower court or by the combined action of the Supreme Court and the lower courts, but simply by the action of the Supreme Court.

Id. "The Supreme Court does not 'ma[k]e' a rule retroactive when it merely establishes principles of retroactivity and leaves the application of those principles to the lower courts." Id. Unless the Supreme Court holds it to be retroactive, "a new rule is not 'made retroactive to cases on collateral review.'" Id. The Court concluded that as no such holding had been made regarding Cage, the claim did not meet the 28 U.S.C. § 2244(b)(2)(A) standard. See id. at 2483.

As noted, the Supreme Court has not yet addressed the retroactivity of Apprendi. In light of the state of law on this point, the undersigned Magistrate Judge finds Tyler and Sanders to be persuasive authority. See United States v. Moss, 252 F.3d 993 (8th Cir. 2001) (finding that Apprendi does not even fall within Teague's exception regarding retroactive application for watershed rules, and that defendant's Apprendi challenge of his sentence was procedurally barred for failure to raise his arguments on direct appeal); McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001) (finding Apprendi error not jurisdictional defect and subject to procedural default, and holding Teague doctrine bars retroactive application in collateral attack of sentence).

Even if Apprendi were applicable retroactively to Movant, her claim would remain futile. Movant was sentenced

to 188 months' incarceration based on the amount of methamphetamine supported by the evidence at trial. The statutory maximum penalty for an unspecified amount of methamphetamine, a controlled substance in Schedule II, is twenty (20) years. See 21 U.S.C. § 841 (b)(1)(C); United States v. Garcia-Guizar, 234 F.3d 483, 488 (9th Cir. 2000). Because Movant's sentence was less than the twenty-year statutory maximum for the offense of which she was convicted, Movant does not present an Apprendi violation (assuming Apprendi applied). Garcia-Guizar, 234 F.3d at 489; United States v. Garcia-Sanchez, 238 F.3d 1200 (2001).

As noted, if the court declines to permit Movant to amend her petition, she asks the court to treat her motion instead as a new § 2255 petition. However, second or successive petitions for habeas corpus relief require that the applicant "move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244 (b)(3). Without such authorization, the district court reviewing the petition lacks jurisdiction to consider the merits of the petition. Cooper v. Calderon, 274 F.3d 1270, 1274 (9th Cir. 2001). Because Movant has not obtained such authorization from the Ninth Circuit, the court lacks jurisdiction to consider the merits of her petition.

The undersigned Magistrate Judge therefore concludes that Movant's Motion to Amend 28 U.S.C. § 2255 Motion, With Leave of Court; Alternatively to Treat this Filing as a New 28 U.S.C. § 2255 Motion should be denied, as the Supreme Court has not made Apprendi retroactive to cases on collateral review, and if considered, Movant's Apprendi claim would fail on the merits. Additionally, if Movant's filing is treated as a new motion, the court would lack jurisdiction to consider it without proper authorization is of the court of appeals.

IT IS THEREFORE RECOMMENDED that Movant's Motion to Vacate, Set Aside, or Correct Sentence pursuant to

28 U.S.C. § 2255 [Doc. # 436] be **DENIED.**

IT IS FURTHER RECOMMENDED that Movant's Motion to Amend 28 U.S.C. 2255 Motion, With Leave of Court; Alternatively to Treat this Filing as a New 28 U.S.C. 2255 Motion [Doc. # 473] be **DENIED.**

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have ten (10) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1) and Rules 72, 6(a) and 6(e) of the Federal Rules of Civil Procedure. Thereafter, the parties have ten (10) days within which to file a response to the objections. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

DATED this 14th day of February, 2002.

/s/ Morton Sitver
MORTON SITVER
United States Magistrate Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
STEPHANIE FAE NELSON,
Defendant-Appellant

No. 02-16074
D. C. No. CV-00-00652-EHC
Arizona, Phoenix

Entered on June 17, 2003

ORDER

Before: WALLACE and LEAVY, Circuit Judges,

The appellant's "Petition for Rehearing and Suggestion for Rehearing En Banc" is construed as a Motion for Reconsideration, and is denied. All pending motions are denied.

There will be no further filings accepted in this closed appeal.

APPENDIX G

U. S. Constitution, Art. II, § 2, cl. 2

He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U. S. Constitution, Art VI, § 4, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U. S. Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury

of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. § 2

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

28 U.S.C. § 2253

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention

pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Extradition Treaty Mexico, 31 U.S.T. 5059

May 4, 1978, Date-Signed

January 25, 1980, Date-In-Force

Treaty signed at Mexico City May 4, 1978; Ratification advised by the Senate of the United States of America November 30, 1979; Ratified by the President of the United States of America December 13, 1979; Ratified by Mexico January 31, 1979;
Ratifications exchanged at Washington January 25, 1980; Proclaimed by the President of the United States of America February 6, 1980; Entered into force January 25, 1980.

TEXT:

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

CONSIDERING THAT:

The Extradition Treaty between the United States of America and the United Mexican States was signed at Mexico City on May 4, 1978, the text of which, in the English and Spanish languages, is hereto annexed;

The Senate of the United States of America by its resolution of November 30, 1979, two-thirds of the Senators present concurring therein, gave its advice and consent to ratification of the Treaty;

The Treaty was ratified by the President of the United States of America on December 13, 1979, in pursuance of the advice and consent of the Senate, and was duly ratified on the part of the United Mexican States;

It is provided in Article 23 of the Treaty that the Treaty shall enter into force on the date of exchange of the instruments of ratification;

The instruments of ratification of the Treaty were exchanged at Washington on January 25, 1980; and accordingly the Treaty entered into force on that date;

NOW, THEREFORE, I, Jimmy Carter, President of the

United States of America, proclaim and make public the Treaty, to the end that it be observed and fulfilled with good faith on and after January 25, 1980, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this sixth day of February in the year of our Lord one thousand nine hundred eighty and of the Independence of the United States of America the two hundred fourth.

EXTRADITION TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED MEXICAN STATES

The Government of the United States of America and the Government of the United Mexican States;

Desiring to cooperate more closely in the fight against crime and, to this end, to mutually render better assistance in matters of extradition;

Have agreed as follows:

ARTICLE 1

Obligation to Extradite

1.- The Contracting Parties agree to mutually extradite, subject to the provisions of this Treaty, persons who the competent authorities of the requesting Party have charged with an offense or have found guilty of committing an offense, or are wanted by said authorities to complete a judicially pronounced penalty of deprivation of liberty for an offense committed within the territory of the requesting Party.

2.- For an offense committed outside the territory of the requesting Party, the requested Party shall grant extradition if:

a) its laws would provide for the punishment of such an offense committed in similar circumstances, or

b) the person sought is a national of the requesting Party, and that Party has jurisdiction under its own laws to try that person.

ARTICLE 2

Extraditable Offenses

1.- Extradition shall take place, subject to this Treaty, for wilful acts which fall within any of the clauses of the Appendix and are punishable in accordance with the laws of both Contracting Parties by deprivation of liberty the maximum of which shall not be less than one year.

2.- If extradition is requested for the execution of a sentence, there shall be the additional requirement that the part of the sentence remaining to be served shall not be less

than six months.

3.- Extradition shall also be granted for wilful acts which, although not being included in the Appendix, are punishable, in accordance with the federal laws of both Contracting Parties, by a deprivation of liberty the maximum of which shall not be less than one year.

4.- Subject to the conditions established in paragraphs 1, 2 and 3, extradition shall also be granted:

a) For the attempt to commit an offense; conspiracy to commit an offense; or the participation in the execution of an offense; or

b) When, for the purpose of granting jurisdiction to the United States government, transportation of persons or property, the use of the mail or other means of carrying out interstate or foreign commerce, is also an element of the offense.

ARTICLE 3

Evidence Required

Extradition shall be granted only if the evidence be found sufficient, according to the laws of the requested Party, either to justify the committal for trial of the person sought if the offense of which he has been accused had been committed in that place or to prove that he is the person convicted by the courts of the requesting Party.

ARTICLE 4

Territorial Application

1.- For the purposes of this Treaty, the territory of a Contracting Party shall include all the territory under the jurisdiction of that Contracting Party, including airspace and territorial waters and vessels and aircraft registered in that Contracting Party if any such aircraft is in flight when the offense is committed.

2.- For the purposes of this Treaty, an aircraft shall be considered to be in flight at any time from the moment when all its external doors are closed following the embarkation until the moment when any such door is opened for disembarkation.

ARTICLE 5

Politicial and Military Offenses

1.- Extradition shall not be granted when the offense for which it is requested is political or of a political character.

If any question arises as to the application of the foregoing paragraph, the Executive authority of the requested Party shall decide.

2.- For the purpose of this Treaty, the following offenses shall not be considered to be offenses included in paragraph 1:

a) The murder or other wilful crime against the life or

physical integrity of a Head of State or Head of Government or of his family, including attempts to commit such an offense.

b) An offense which the Contracting Parties may have the obligation to prosecute by reason of a multilateral international agreement.

3.- Extradition shall not be granted when the offense for which extradition is requested is a purely military offense.

ARTICLE 6

Non bis in idem

Extradition shall not be granted when the person sought has been prosecuted or has been tried and convicted or acquitted by the requested Party for the offense for which extradition is requested.

ARTICLE 7

Lapse of Time

Extradition shall not be granted when the prosecution or the enforcement of the penalty for the offense for which extradition has been sought has become barred by lapse of time according to the laws of the requesting or requested Party.

ARTICLE 8

Capital Punishment

When the offense for which extradition is requested is punishable by death under the laws of the requesting Party and the laws of the requested Party do not permit such punishment for that offense, extradition may be refused unless the requesting Party furnishes such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

ARTICLE 9

Extradition of Nationals

1.- Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.

2.- If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense.

ARTICLE 10

Extradition Procedures and Required Documents

1.- The request for extradition shall be made through the diplomatic channel.

2.- The request for extradition shall contain the description of the offense for which extradition is requested and shall be accompanied by:

a) A statement of the facts of the case;

b) The text of the legal provisions describing the essential elements of the offense;

c) The text of the legal provisions describing the punishment for the offense;

d) The text of the legal provisions relating to the time limit on the prosecution or the execution of the punishment of the offense;

e) The facts and personal information of the person sought which will permit his identification and, where possible, information concerning his location.

3.- In addition, when the request for extradition relates to a person who has not yet been convicted, it shall be accompanied by:

a) A certified copy of the warrant of arrest issued by a judge or other judicial officer of the requesting Party;

b) Evidence which, in accordance with the laws of the requested Party, would justify the apprehension and commitment for trial of the person sought if the offense had been committed there.

4.- When the request for extradition relates to a convicted person, it shall be accompanied by a certified copy of the judgment of conviction imposed by a court of the requesting Party.

If the person was found guilty but not sentenced, the extradition request shall be accompanied by a certification to that effect and a certified copy of the warrant of arrest.

If such person has already been sentenced, the request for extradition shall be accompanied by a certification of the sentence imposed and a statement indicating which part of the sentence has not been carried out.

5.- All the documents that must be presented by the requesting Party in accordance with the provisions of this Treaty shall be accompanied by a translation in the language of the requested Party.

6.- The documents which, according to this Article, shall accompany the request for extradition, shall be received in evidence when:

a) In the case of a request emanating from the United States, they are authenticated by the official seal of the Department of State and legalized by the manner prescribed by the Mexican law;

b) In the case of a request emanating from the United Mexican States, they are certified by the principle diplomatic or consular officer of the United States in Mexico.

ARTICLE 11

Provisional Arrest

1.- In the case of urgency, either Contracting Party may request, through the diplomatic channel, the provisional arrest of an accused or convicted person. The application shall contain a description of the offense for which the extradition is requested, a description of the person sought and his whereabouts, an undertaking to formalize the request for extradition, and a declaration of the existence of a warrant of arrest issued by a competent judicial authority or a judgment of conviction issued against the person sought.

2.- On receipt of such a request, the requested Party shall take the necessary steps to secure the arrest of the person claimed.

3.- Provisional arrest shall be terminated if, within a period of 60 days after the apprehension of the person claimed, the executive authority of the requested Party has not received the formal request for extradition and the documents mentioned in Article 10.

4.- The fact that the provisional arrest is terminated pursuant to paragraph 3 shall not prejudice the extradition of the person sought if the request for extradition and the necessary documents mentioned in Article 10 are delivered at a later date.

ARTICLE 12

Additional Evidence

If the Executive authority of the requested Party considers that the evidence furnished in support of the request for

extradition is not sufficient in order to fulfill the requirements of this Treaty, that Party shall request the presentation of the necessary additional evidence.

ARTICLE 13

Procedure

1.- The request for extradition shall be processed in accordance with the legislation of the requested Party.

2.- The requested Party shall make all arrangements necessary for internal procedures arising out of the request for extradition.

3.- The competent legal authorities of the requested Party shall be authorized to employ all legal means within their power to obtain from the judicial authorities the decisions necessary for the resolution of the request for extradition.

ARTICLE 14

Decision and Surrender

1.- The requested Party shall promptly communicate to the requesting Party its decision on the request for extradition.

2.- In the case of complete or partial rejection of a request for extradition, the requested Party shall give the reasons on which it was based.

3.- If the extradition is granted, the surrender of the

person sought shall take place within such time as may be prescribed by the laws of the requested Party. The competent authorities of the Contracting Parties shall agree on the date and place of the surrender of the person sought.

4.- If the competent authority has issued the warrant or order for the extradition of the person sought and he is not removed from the territory of the requested Party within the prescribed period, he shall be set at liberty and the requested Party may subsequently refuse to extradite him for the same offense.

ARTICLE 15

Delayed Surrender

The requested Party, after granting the extradition, may defer the surrender of the person sought when that person is being proceeded against or is serving a sentence in the territory of the requested Party for a different offense, until the conclusion of the proceeding or the full execution of the punishment that has been imposed.

ARTICLE 16

Requests for extradition made by Third States

The requested Party, in the case of receiving requests from the other Contracting Party and from one or more third States for the extradition of the same person, be it for the same offense or for different offenses, shall decide to which requesting State it shall grant the extradition of that person.

ARTICLE 17

Rule of Speciality

1.- A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which extradition has been granted nor be extradited by that Party to a third State unless:

a) He has left the territory of the requesting Party after his extradition and has voluntarily returned to it;

b) He has not left the territory of the requesting Party within 60 days after being free to do so; or

c) The requested Party has given its consent to his detention, trial, punishment or extradition to a third State for an offense other than that for which the extradition was granted.

These stipulations shall not apply to offenses committed after the extradition.

2.- If, in the course of the procedure, the classification of the offense is changed for which the person requested was extradited, he shall be tried and sentenced on the condition that the offense, in its new legal form:

a) Is based on the same group of facts established in the request for extradition and in the documents presented in its support; and

b) Is punishable with the same maximum sentence as the crime for which he was extradited or with a lesser sentence.

ARTICLE 18

Summary Extradition

If the person sought informs the competent authorities of the requested Party that he agrees to be extradited, that Party may grant his extradition without further proceedings, and shall take all measures permitted under its laws to expedite the extradition. In such cases Article 17 shall not be applicable.

ARTICLE 19

Surrender of Property

1.- To the extent permitted under the law of the requested Party and subject to the rights of third parties, which shall be duly respected, all articles, instruments, objects of value or documents relating to the offense, whether or not used for its execution, or which in any other manner may be material evidence for the prosecution, shall be surrendered upon the granting of the extradition even when extradition cannot be effected due to the death, disappearance, or escape of the accused.

2.- The requested Party may condition the surrender of articles upon a satisfactory assurance from the requesting Party that the articles will be returned to the requested Party as soon as possible.

ARTICLE 20

Transit

1.- The right to transport through the territory of one of the Contracting Parties a person who is not a national of that Contracting Party surrendered to the other Contracting Party by a third State shall be granted on presentation made through the diplomatic channel of a certified copy of the decision on extradition, provided that reasons of public order are not opposed to the transit.

2.- The authorities of the transit State shall be in charge of the custody of the extradited person while that person is in its territory.

3.- The Party to which the person has been extradited shall reimburse the State through whose territory such person is transported for any expenses incurred by the latter in connection with such transportation.

ARTICLE 21

Expenses

The requested Party shall bear the expenses of the arrangements referred to in Article 13, with the exception that the expenses incurred for the translation of documents and, if applicable, for the transportation of the person ordered extradited shall be paid by the requesting Party.

ARTICLE 22

Scope of Application

1.- This Treaty shall apply to offenses specified in Article 2 committed before and after this Treaty enters into force.

2.- Requests for extradition that are under process on the date of the entry into force of this Treaty, shall be resolved in accordance with the provisions of the Treaty of 22 February, 1899,[1] and the Additional Conventions on Extradition of 25 June 1902,[2] 23 December 1925,[3] and 16 August 1939.[4]

ARTICLE 23

Ratification, Entry into Force, Denunciation

1.- This Treaty shall be subject to ratification; the exchange of instruments of ratification shall take place in Washington as soon as possible.

2.- This Treaty shall enter into force on the date of exchange of the instruments of ratification.

3.- On entry into force of this Treaty, the Treaty of Extradition of 22 February 1899 and the Additional Conventions on Extradition of 25 June 1902, 23 December

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[1] TS 242; 31 Stat. 1818.

[2] TS 421; 9 Bevans 918.

[3] TS 741; 44 Stat. 2409.

[4] TS 967; 55 Stat. 1133.

1925 and 16 August 1939 between the United States of America and the United Mexican States, shall cease to have effect without prejudice to the provisions of Article 22.

4.- Either Contracting Party may terminate this Treaty by giving notice to the other Party. The termination shall take effect six months after the receipt of such notice.

Done in two originals, in the English and Spanish languages, both equally authentic, at Mexico City this fourth day of May, one thousand nine hundred seventy-eight.